U.S. Department of Labor

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Issue Date: 08 January 2009

CASE NOS.: 2005-SOX-50
2005-SOX-51

IN THE MATTER OF

ANTONIO ANDREWS and
NIQUEL BARRON
Complainants

v.

ING NORTH AMERICA INSURANCE CORP.
Respondent

DECISION AND ORDER ON REMAND

Preface

Complainants Antonio Andrews and Niquel Barron became employed by Respondent ING North America Insurance Corporation (NAIC) in 2001 and 2003, respectively. In December 2003, Andrews and Barron were responsible for the installation of a device, called QVision (the Q-1 Box), on the company network. In January 2004, after reviewing the data generated by the Q-1 Box, Barron became concerned that the network had become susceptible to certain threats. He reported his findings to Andrews, who recommended that Claimant present his report to Derek Reynolds, the Chief Information Security Officer (CISO) at that time. It is Complainants' contention that the report summarizing the findings of the Q-1 box that Barron submitted to Derek Reynolds in January 2004, along with allegations submitted via a written statement completed by Andrews in February 2004 as part of the investigation into the installation of the Q-1 Box, amounted to protected activity and is the reason both Complainants were ultimately terminated.

As set out hereafter, I do not agree with Complainants. Respondent does not appear to be a covered employer under the Act, and the evidence does not support a finding that Complainants participated in protected activity under the Act.

Background

This case arises from a combined complaint filed by Antonio Andrews and Niquel Barron, (Complainants) against ING North America Insurance Corporation (NAIC), alleging violations of the employee protection provisions at Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. §1514A (the Act). Enacted on July 30, 2002, the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under Section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)). Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 49 U.S.C. §42121(b). 18 U.S.C. §1514A(b)(2)(B).

On June 4, 2004, Complainants filed a combined whistleblower complaint with the Occupational Safety & Health Administration (OSHA), U.S. Department of Labor, against "ING GROEP, N.V., a Dutch corporation which is listed on the New York Stock Exchange, its subsidiary, ING USA Holding Corporation, and Derrick Reynolds, Allen Wilson and Robert Guinn, individually…." (ALJ 1). After an investigation, OSHA's regional director issued a letter dated March 24, 2005, stating that Respondent NAIC was not a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, nor was it required to file reports under Section 15d of the Securities Exchange Act of 1934. However, OSHA denied Complainants' complaint based on a failure to demonstrate that they participated in protected activity, without further addressing whether a wholly owned subsidiary of ING Groep, N.V. was a covered employer within the meaning of the Act (ALJ 2).

Complainants appealed to the Office of Administrative Law Judges, U.S. Department of Labor, on April 19, 2005 (ALJ 3). The case was initially set for trial on September 27, 2005, but at the joint request of the parties the trial was postponed until November 30, 2005 (ALJ 4). A formal hearing was conducted before me in Atlanta, Georgia, on November 30 and December 1, 2005, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Complainants' exhibits, Respondent's exhibits, and ALJ exhibits were admitted into evidence.[1]

At the onset of the trial it was noted on the record that despite previous confusion, the only parties to the case were the two Complainants and Respondent, NAIC, and it was further acknowledged that one of the issues for my determination was whether or not the Respondent was an employer within the meaning of the Act (Tr. 17, 18).[2] Following the conclusion of Complainants' case on the second day of the hearing, Respondent's counsel moved to dismiss the case upon the grounds that Respondent was not a covered employer under the Act (Tr. 455). Because the record was close to being concluded, and any determination I made on the issues needed to be in the form of a written decision, I declined to grant the motion until I could visit the state of the law (Tr. 465, 466). The hearing was completed on December 1, 2005.

By letter dated January 12, 2006, I invited both parties to brief the sole issue of whether or not Respondent, standing alone, was a covered employer under the Act. After consideration of these briefs and a review of the decisions rendered on the subject, on February 17, 2006, I granted Respondent's Motion to Dismiss, finding that Respondent alone was not a covered employer under the Act (Decision and Order (D&O), p. 6).

[1] The exhibits that were received into evidence are enumerated at pages 4 and 258-259 of the trial transcript. Complainant did not offer all of his exhibits, some were withdrawn and others were rejected for lack of foundation or authenticity. Likewise, Respondent withdrew some of its exhibits. The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- (Tr. __); Administrative Law Judge Exhibit- (ALJ __, p.__); Complainants' Exhibit- (CX __, p.__); and Respondent's Exhibit- (RX __, p.__).

[2] By a motion dated November 28, 2005, and faxed to this office on November 29, 2005, Complainants had filed a Motion to Amend the Complaint to name ING Groep, N.V. as a respondent, but that motion was abandoned by Complainants and the following day the trial went forward against Respondent only.

Complainants appealed to the Administrative Review Board (the Board), which issued a Final Decision and Order of Remand on August 29, 2008. The Board found that Complainants were not required to name ING Groep, N.V. as a respondent, and remanded in order to give the Complainants an opportunity to prove that NAIC (Respondent), a subsidiary of ING Groep, N.V., acted as its agent in line with *Klopfenstein v. PCC Flow Techs. Holdings, Inc*., ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006), and was therefore a covered employer under the Act. (ARB's August 29, 2008, Decision and Order (ARB D&O), pp. 3-5).

The parties submitted briefs and proposed findings of facts. I have reviewed and considered these briefs and proposed findings and the entire record in making my determination in this matter.[3]

Findings of Fact

Relationship Between NAIC and ING Groep, N.V.

1. NAIC is not a publicly-traded company (D&O p. 4).

2. NAIC is a subsidiary of a subsidiary of a subsidiary of a subsidiary of the parent company ING Groep, N.V. (ING Group), which is a publicly-traded corporation (RX 38, pp. 6-9).

3. NAIC's parent company is ING America Insurance Holdings, Inc. (RX 38, pp. 8-9).

4. The parent company of ING America Insurance Holdings, Inc. is ING Insurance International B.V., whose parent company is ING Verzekeringen N.V. Both ING Insurance International B.V. and ING Verzekeringen N.V. are non-public, Dutch companies headquartered in the Netherlands (RX 38, pp. 8-9).

5. The parent company of ING Verzekeringen N.V. is ING Group, which is a publicly-traded company (RX 38, p. 9).

[3] The factual conclusions that follow are in part those proposed findings by the parties in their post-hearing proposed findings of fact, for where I agreed with summations I adopted the statements rather than rephrasing the sentences.

6. ING Group has no offices within the United States (RX 38, p. 8).

7. ING Group uses a two-tiered corporate structure consisting of a supervisory board and an executive board (RX 38, p. 20).

8. ING Group and Respondent NAIC do not share a board of directors and do not have any common directors. ING Group has no involvement in the day-to-day management, including personnel decisions, of NAIC (RX 38, pp. 9-10).

9. ING Group has established a Code of Conduct for all of its employees, including those employees of subsidiaries such as NAIC. This Code of Conduct is enforced through ING Exchange, the company's Intranet, and all employees have to acknowledge it (RX 38, pp. 14-16, 23-24).

10. "ING Americas" is the title given to an ING business region, specifically the United States, Canada and Latin America (RX 38, p. 11).

Complainants' Employment

11. Both Complainants were employed by NAIC (D&O, p. 2).

12. Complainant Andrews was hired on April 13, 2001 as a Director of Information Security for ING Americas (Tr. 214; CX 22, p. 1).

13. Andrews signed the ING Employee Handbook Acknowledgment Form on August 27, 2001. This form informed Andrews that he could access the policies governing his employment with ING on ING Exchange, the company's Intranet. By signing the form, Andrews acknowledged that his employment was "at will," and that any modifications to this arrangement had to be made in writing and signed by the CEO of ING Americas (CX 14).

14. At the time he was hired, Andrews' primary job function was to standardize the security within ING Americas. In furtherance of this effort, Andrews created the Hardening the Perimeter Project (HTP Project), an ING Americas initiative to identify and mitigate security risks (Tr. 217-218).

15. Andrews initially reported to Steve Colletti, the Chief Information Security Officer (CISO); however, around March or April 2003, Andrews was demoted and began to report to Allen Wilson. His new job duties included focusing on application-level issues and working with actual U.S. based customers on a day-to-day basis. He was asked to step away from his involvement with the HTP Project (Tr. 224, 227, 229-232; RX 39, p. 6).

16. Complainant Niquel Barron was hired by Andrews on September 6, 2002 as an Information Technology Security Consultant (CX 19, p. 1).

17. Barron signed the ING Employee Handbook Acknowledgment Form on March 12, 2003. This form informed Barron that he could access the policies governing his employment with ING on ING Exchange, the company's Intranet. By signing the form, Barron agreed to read the Code of Conduct and Policy Statement and acknowledged that "complying with all applicable rules, laws and ethical business standards in order to safeguard ING Americas' good reputation and integrity, is vital to the interest of the Organization….." His signature also confirmed his understanding that his employment was "at will," and any modification to this arrangement had to be in writing and signed by the CEO of ING Americas (CX 1).

18. At the time he was hired, Barron's primary job function was to act as a technical liaison with ING Americas Infrastructure Services (AIS), and to work with multiple applications and services to help secure the environment (Tr. 44).

19. In January of 2004, Derek Reynolds replaced Colletti as CISO, and at that time, Complainants began indirectly reporting to Reynolds through Wilson (RX 39, pp. 4-6).

NAIC's Policies and Procedures

20. NAIC monitors network security through a variety of means, including the installation of devices onto the network for the purpose of detecting security risks (Tr. 55-57). NAIC has established policies, procedures and protocols for the installation of such devices (RX 39, pp. 13-21, 105-106).

21. To install a device on NAIC's network as part of the HTP Project, approval of the project steering committee is required (Tr. 469-470).

22. In addition to approval by the steering committee, NAIC has developed change control procedures which are intended to ensure that all changes or additions to the network are properly documented (Tr. 475; RX 39, pp. 18-19).

23. Before a device can be installed on NAIC's network, the change control process requires that the Legal and Procurement Departments be notified and given an opportunity to review the equipment and negotiate a vendor contract (RX 39, pp. 14, 18, 21).

24. The change control process also requires that a device be placed on a test network for review prior to installation on a production network (RX 39, p. 16).

25. Policies and protocol further provide that third parties are not permitted to enter NAIC's data center, located in Minneapolis, to install devices without authorization and/or without signing a non-disclosure and/or confidentiality agreement (Tr. 477).

GWAN Compliance Effort and the Hardening of the Perimeter Project

26. Around the time that Andrews was hired by NAIC, ING Group had mandated that its Global Wide Area Network (GWAN) become compliant with twenty-one of the International Standards Organization's (ISO) security controls (Tr. 215; RX 39, pp. 34, 38-39). These twenty-one controls primarily covered internal business unit access information, email, corporate use, and internet use (RX 39, pp. 38-39).

27. GWAN compliance is an internal ING policy that was not mandated by law, and none of the ISO controls are based on any particular laws or regulations (RX 39, p. 35).

28. For ING Americas, in addition to establishing compliance with the ISO controls, the GWAN effort attempted to ensure compliance with specific security requirements of certain federal and state laws, including the Gramm-Leach-Bliley Act, the Sarbanes-Oxley Act, HIPAA, SB1-1386 (California Security Breach Law), the Patriot Act, the Securities and Exchange Act, NASD regulations, and New York Regulation 173 (Tr. 242-243, 332).

29. The GWAN compliance effort was broken down into two levels: GWAN Level I and GWAN Level II. GWAN Level I was predominately responsible for securing the perimeter, securing access, and securing cross-vulnerabilities (Tr. 228).

30. The HTP Project was developed to assist in implementing compliance with GWAN Level I (Tr. 228). Its purpose was to tighten all the entrances and exits to the network, and to ensure that there were adequate controls over third-party connections (Tr. 218, 470).

31. The HTP Project was broken down into two teams: Americas Infrastructure Services (AIS) and Information Risk Management (IRM) (Tr. 47-48). Barron and Andrews were both part of the IRM team (Tr. 431).

32. As part of the HTP Project, certain tools were placed on the network. AIS handled the implementation of these tools, and IRM read the data these tools produced and made sure safeguards were working (Tr. 47-48, 51).

33. In November 2003, after continuing discussions with Wilson and after collecting data via surveys, Andrews told Wilson that he felt the company was not GWAN compliant and expressed frustration that none of the regulatory compliance efforts had been addressed. (Tr. 236-241).

34. On February 11, 2004, Reynolds and his supervisor, David Gutierrez, gave a presentation to the executive management of ING Americas regarding the status of their GWAN compliance (RX 39, p. 37). They reported compliance to be 97 percent complete, but discovered that the guidelines they had followed to determine completion were less stringent than the guidelines propounded by the executive management; therefore, under the executive management's definition, compliance was nowhere near 97 percent complete. (RX 39, pp. 39-40).

Installation of the Q-1 Box

35. In late 2003, Complainants began preliminary discussions, by way of e-mails with Price Waterhouse Coopers (PWC) and Q-1 Labs, regarding the potential installation of the Q-1 Box, a device which monitors networks activities (CX 31, pp. ING 000754, 000772-000794). The only persons employed by ING

who were party to these email discussions included Andrews, Barron, and Dale Henninger, a Network Operations Representative with the AIS group who physically installed the device on the network (Tr. 60-61, 275; CX 31, pp. ING 000583-000584, 000772-000794).

36. A meeting was held on November 17, 2003, in which a representative from Q1 Labs presented and demonstrated the Q-1 Box to Barron, Andrews, and Drew Vesser, a Senior Information Security Consultant hired by Andrews. Wilson attended only briefly. At the close of this meeting, Barron explained to PWC and Q-1 Labs that NAIC would not be purchasing the Q-1 Box at that time due to budgetary concerns (Tr. 69-71, 273, 288, 392).

37. Sometime following the November 17, 2003 meeting, PWC and Q-1 Labs offered to supply the Q-1 Box free of charge (Tr. 274-5).

38. On December 5, 2003, Michael Wingate, a representative from Q-1 Labs, conducted a conference call with Barron and Henninger regarding the planned installation of the Q-1 Box. He sent a follow-up email to Barron and Henninger that same day, requesting that they complete, sign, and return an attached evaluation agreement. Andrews was copied on this email (CX 31, p. ING 000785).

39. The Q-1 Box was installed on the network at the data center in Minneapolis on December 12, 2005. Wingate sent a follow-up email to Barron and Henninger confirming installation and once again requesting that they complete, sign and return the evaluation agreement. Andrews was again copied on this email (CX 31, p. ING 000793).

40. Barron sent an email to Reynolds on January 14, 2004, outlining his current activities. Among these activities he listed: "Q1 Lab Pricewaterhouse Eval Reporting/Qvision 2.0 Evaluation" (CX 30, p. ING 000521).

Complainants' Termination

41. In early January 2004, after reviewing the data generated by the Q-1 Box, Barron approached Andrews regarding what he had identified as threats to the security of the network, including viruses and unauthorized traffic (Tr. 278). Andrews instructed Barron to inform Reynolds of the alleged threat (Tr. 279).

42. In early February 2004, Barron presented the Q-1 Box findings to Reynolds along with his concerns that the network had become infected with viruses (Tr. 83, 89).

43. Because Reynolds was unaware the Q-1 Box was on the system, he investigated the circumstances surrounding the installation of the Q-1 Box (RX 39, pp. 10-22; CX 31, pp. 000599, 000605).

44. Based on the information discovered during Reynolds' investigation, it was ultimately determined that NAIC's policies and procedures for the installation of devices onto the network, including steering committee approval and compliance with change control and confidentiality agreements, had been bypassed, and that Complainants had installed the scanning device without authority and without complying with NAIC's security protocols (Tr. 410-411; RX 39, pp. 16-18; CX 28; p. ING 000326).

45. Reynolds also determined that the Q-1 Box was not associated with the HTP Project (RX 39, Exhibits 1-2).

46. Due to their violation of company policy, Reynolds concluded that there were sufficient grounds to terminate Complainants (RX 39, p. 26).

47. On February 10, 2004, during individual termination meetings with Reynolds and Chris Powell, Human Resources Director for ING Americas, Complainants alleged that they were aware of other devices that had been installed onto the network without following the proper procedures and protocols (Tr. 108, 291; RX 39, pp. 26-28). Based upon these statements, Reynolds and Powell decided to suspend Complainants pending an investigation into their allegations (Tr. 109; RX 39, pp. 26-28).

48. Complainants were placed on paid leave of absence pending an investigation by ING Americas Corporate Audit Services, Special Investigation Unit (Tr. 107-112; CX 31, p. ING 000537).

49. Joseph Schaedler, a Corporate Audit Services Investigator, looked into the allegations and issues related to Complainants' conduct (RX 39, pp. 27-28). During the course of the investigation, Schaedler interviewed, among others, Barron, Andrews, Reynolds, Wilson, and Robert Guinn (Head of Operations for IRM at NAIC, and Henninger's supervisor) (Tr. 468, 472; CX 31, pp. ING 000576-ING 000586).

50. On February 24, 2004, in the course of Schaedler's investigation, Andrews submitted a written statement. In this statement, Andrews wrote that the GWAN compliance report was going to be invalid, that he had notified both Gutierrez and Reynolds of this fact, and that the Q-1 Box would have revealed this non-compliance. He also claimed that the objective of the HTP Project had not been met, as no open network security issues had been resolved and GWAN compliance had not been addressed (CX 17, p. B&A 00075-00076).

51. Schaedler determined that the Complainants' allegations lacked merit, that Barron and Andrews had violated procedures and protocol with regard to the evaluation and installation of devices,[4] and that there was no widespread policy violation occurring (RX 39, p. 30).

52. Given the investigative findings, Reynolds decided to terminate Complainants for installing network equipment with no controls, no authority, and no documentation in violation of NAIC policy (RX 39, pp. 30-31).

53. Andrews was given the opportunity to resign in lieu of termination, and he agreed to do so, effective March 16, 2004 (CX 28, p. ING 000325).

54. Barron was offered the same opportunity, but declined to resign. Accordingly, he was discharged by Reynolds and Powell, effective March 12, 2004 (CX 28, p. ING 000325).

Discussion and Conclusions of Law

Covered Employers

Section 806 of the Act states, in relevant part:

> No company with a class of securities regulated under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (U.S.C. 780(d)), or any officer, employee, contractor,

[4] Mr. Henninger was also found to have violated the procedures and protocols; however his employment with ING ceased in mid-December 2003. (RX 39, p. 107). He was deemed ineligible for re-hire with ING (Tr. 498; CX 28, p. ING 000326).

> subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)…

18 U.S.C. §1514A(a)(1); *see also* 29 C.F.R. §1980.102(a), (b)(1).

In the present case, it is undisputed that Respondent is not a covered employer under the Act, since NAIC does not have a class of securities regulated under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), nor is the company required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (U.S.C. 780(d)). Therefore, unless Complainants can show that the parent company is liable for Respondent's actions, this case must be dismissed for lack of jurisdiction.[5]

[5] The Administrative Review Board has determined that a publicly traded corporation need not be named in order to bring an action under the Act, so long as the Complainant names at least one respondent who is covered under the Act as an officer, employee, contractor, subcontractor or agent of a public entity. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB No. 04-149, at *13 (ARB May 31, 2006).

Under general corporate law principles, a parent corporation cannot be held responsible for the actions of its subsidiaries. *U.S. v. Bestfoods*, 524 U.S. 51, 61 (1998). The exception to this principle occurs when a parent corporation is using its subsidiaries as an agent or instrumentality in order to "accomplish certain unlawful purposes, most notably fraud, on the shareholder's behalf." *Id*. at 62-63. In other words, a non-public subsidiary of a public corporation can be covered under the Act if there is a showing that the subsidiary is an agent of the parent corporation acting on the parent's behalf and under the parent's control. *Klopfenstein* at 13-14.

According to the Board, the question of whether a subsidiary has acted as an agent for a public parent corporation for purposes of the Act must be determined according to the common law principles of agency, which depend "upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control." *Klopfenstein*, 13-14; *See also* Rest. 2d. Agency §1(1), comment b. More specifically, it must be found that the subsidiary was acting as an agent for the parent corporation regarding employment decisions affecting the complainant. *Srivastava v. Harris Investment Management*, 2007-SOX-24 (ALJ Mar. 28, 2008).

In this instance, there is insufficient evidence to show that NAIC acted as an agent of ING Group. While all employees of ING Group's subsidiaries, including Complainants, are subject to ING Group's Business Policies and Code of Conduct, the ING Employee Handbook Acknowledgment Forms that Barron and Andrews signed indicate that any changes to their employment agreement must be submitted to the CEO of ING Americas. Furthermore, the ING Group and NAIC do not share a board of directors, do not have any common directors, and ING Group, which has no offices in the United States, has no involvement in the day-to-day management, including personnel decisions, of NAIC.[6]

[6] *See Srivastava v. Harris Investment Management*, 2007-SOX-24 (A.L.J. Mar. 28, 2008) (Non-public respondent was not an agent of its public parent despite the presence of the parent company's trademark on the complainant's paystubs, orientation materials referencing the policies of the parent company, an employment application thanking the complainant for applying to the parent company, and a separation agreement prohibiting the complainant from releasing confidential information without the consent of the parent company); *Savastano v. WPP Group, PLC*, 2007-SOX-00034 (A.L.J. July 18, 2007) (No evidence of agency relationship between public parent and non-public subsidiary where the subsidiary acts and is run independently, and the entities maintain separate offices, operations, and officers and are rarely, if ever involved in the other's daily activities); *Hughart v. Raymond James & Associates, Inc.*, 2004-SOX-9 (A.L.J. Dec. 17, 2004) (Non-public subsidiary was not an agent of its public parent company despite the fact that the complainant's benefits were provided by the parent company, the subsidiary's employees

More importantly, however, there is no evidence supporting the contention that ING Group was involved in employment decisions directly affecting Complainants, namely the decision to terminate their employment. In order to establish an agency relationship, it is not enough to show that a publicly-traded parent company has at some point influenced any employment decisions of its non-public subsidiary. The agency relationship, to be covered under the Act, must pertain to employment decisions directly affecting the complainants. *Srivastava*, at pp. 4-5. In the present case, Complainants were fired by Powell and Reynolds, the Human Resources Director and CISO for ING Americas, respectively. Although Reynolds consulted with the legal and auditing departments and his supervisors over whether Complainants' actions constituted sufficient grounds for termination, the ultimate decision to terminate Barron and Andrews was made by Reynolds alone (RX 39, pp. 26, 31, 61-64, 103). There is no indication that ING Group was involved in or even aware of Complainant's termination. In sum, there is insufficient evidence that Respondent NAIC acted as an agent of its publicly-traded parent company, ING Group, in the termination of Complainants' employment, and therefore the case against Respondent should be dismissed.

Protected Activity

In the event that Respondent should be found to be a covered employer under the Act, Complainants would nevertheless be unable to show that they participated in protected activity.

Whistleblower complaints brought under the Act are governed by the legal burdens of proof enumerated in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). 18 U.S.C. §1514A(b)(2)(C); 49 U.S.C. §42121(b). The complainant has the initial burden of proving by a preponderance of evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an adverse employment action; and (4) the protected activity was a contributing factor in the adverse employment action. The burden then shifts to the employer to prove by clear and convincing evidence that the complainant would have been subjected to the adverse employment action in the absence of the protected activity. *Allen v. Administrative Review Board, USDOL*, 514 F.3d 468, 475-476 (5th Cir. 2008); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008).

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were required to follow the parent company's ethics policy, the subsidiary's letterhead had the parent company's logo and address, and the parent and subsidiary shared a location).

An employee engages in protected activity when he communicates information to an employer which he reasonably believes constitutes a violation of laws and/or regulations relating to shareholder fraud. This reasonable belief must be both subjective and objective.[7] The employee must also show that his communications to his employer "definitively and specifically" related to one of the six enumerated categories in §1514A of the Act: (1) mail fraud; (2) wire fraud; (3) bank fraud; (4) securities fraud; (5) any rule or regulation of the SEC; or (6) any provision of federal law relating to fraud against shareholders. *Allen* at 476-477.

In this case, Barron alleges he participated in protected activity when he communicated his concerns about the findings of the Q-1 Box to Reynolds in January 2004. He found that the reports generated by the Q-1 Box revealed vulnerabilities in the network, which he felt could lead to loss of privacy information and financial records (Tr. 118, 278). Barron's testimony at the formal hearing on this matter suggested that these vulnerabilities could be considered violations of certain regulatory requirements, and Andrews testified that these security threats could put ING Group's shareholders at risk (Tr. 48-49, 299). However, there is no indication that Barron reasonably believed, at the time he presented the findings to Reynolds, that these alleged security threats constituted a violation of any law or regulation relating to shareholder fraud. The record lacks evidence that Barron's communication of the Q-1 Box findings to Reynolds "definitively and specifically" related to one of the six enumerated categories in §1514A of the Act. Reynolds testified that neither Barron nor Andrews ever came to him with concerns regarding violations of securities laws or regulations, securities or shareholder fraud within the company, or violations of laws or regulations in connection with information security operations, nor did they ever tell him that they had reported violations or raised issues relating to securities and shareholder fraud to someone else (RX 39, pp. 32-34). "Speculative allegations" made during testimony at the hearing and after termination are insufficient to amount to protected activity. *Giurovici v. Equinox, Inc.*, ARB No. 07-027, at *7 (Sept. 30, 2008).

[7] A reasonable but mistaken belief does constitute protected activity under the Act. *Allen* at 477.

Barron's report to Reynolds also fails to constitute protected activity because his job duties as Information Security Officer included reporting issues and concerns with the network, and an action that is part of an employee's assigned duties cannot be protected activity. *Robinson v. Morgan Stanley*, 2005-SOX-44 (A.L.J. Mar. 26, 2007).

Andrews' alleged protected activity consists of his communication to Wilson in November 2003, along with his written statement as part of Schaedler's investigation in February 2004, that ING Americas was not GWAN compliant, despite reports that it was. While I find it reasonable that Andrews subjectively believed Wilson and Reynolds were participating in fraud by reporting to executive management that ING Americas was GWAN compliant when it was not, there is no evidence that he believed this fraud was related to ING's shareholders. Andrews' communications, at the time they were made, did not "definitively and specifically" relate to mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.

Andrews testified that he mentioned to Wilson in November 2003 that ING America was not compliant with the regulatory aspects of GWAN, which he testified included the following regulations: the Gramm-Leach-Bliley Act, the Sarbanes-Oxley Act, HIPAA, SB1-1386 (California Security Breach Law), the Patriot Act, the Securities and Exchange Act, NASD regulations, and New York Regulation 173. However, while there are provisions within these regulations that address shareholder fraud, GWAN compliance was concerned with only those provisions dealing with security requirements intended to protect customer information. It does not follow that non-compliance with GWAN automatically constitutes non-compliance with the shareholder provisions of these statutes. Therefore, Andrews' report of non-compliance with the regulatory aspects of GWAN, without including more specific statements regarding securities fraud or violations of any federal law relating to fraud against shareholders, was too vague and therefore insufficient to amount to protected activity.

In sum, had Respondent qualified as a covered employer under the Act, I would still dismiss the case due to the failure of both Andrews and Barron to show that they engaged in protected activity.

Conclusion

ORDER

Complainants' complaint is hereby **DISMISSED** for the reasons that Respondent is not a covered employer under the Act and Complainants failed to show that they engaged in protected activity under the Act.

So ORDERED this 8th day of January, 2009, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).